IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1914

EVELYN FALKOWSKI,

Petitioner

v.

BERTRAM N. PERRY,

Respondent

and

LOWELL W. PERRY, etc. *et al.*,
(Equal Employment Opportunity Commission),

Respondent

REPLY TO OPPOSITION

Evelyn Falkowski, *Pro se*
2501 N. Kenilworth St.
Arlington, Virginia 22207
(703) 534-4270

Of Counsel:
Edward Owen Falkowski, Esq.
P.O. Box 18
Fayetteville, Tenn. 37334

Owen Perry, Esq.
3000 Town Center
Suite 2121
Southfield, Mich. 48075

Kathleen Hamor, Esq.
5 Oxford Street
Chevy Chase, Md. 20815

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LAWRENCE DUMAS, JR.
E. T. BROWN, JR.
GEORGE F. MAYNARD
WILLIAM F. GARDNER
ROBERT H. WALSTON
FRANK C. GALLOWAY, JR.
L. VASTINE STABLER, JR.
CHARLES HAYES
N. LEE COOPER
FRANK McRIGHT
MEADE FRIERSON III
CRAWFORD S. McGIVAREN, JR.
FOURNIER J. GALE III
LAWRENCE DUMAS III
C. HENRY MARSTON
DOUGLAS T. ARENDALL
KIRBY SEVIER
SYDNEY F. FRAZIER, JR.
BENJAMEN T. ROWE
WILLIAM A. ROBINSON
VERNON L. WELLS II
GEORGE G. LYNN
JAMES L. BIRCHALL
J. HOBSON PRESLEY, JR.
MICHAEL C. QUILLEN
DONALD J. STEWART
CATHY S. WRIGHT
DAVID B. ANDERSON
H. THOMAS WELLS, JR.
ROY J. CRAWFORD
WILLIAM R. THOMAS

L. MURRAY ALLEY
COUNSEL

LARRY B. CHILDS
JOHN D. JOHNS
DAVID L. KANE
R. MICHAEL LEONARD
CARL L. GORDAY
RALPH H. SMITH
KATHLEEN A. COLLIER
JAMES L. GOYER III
R. BOYD MILLER
A. INGE SELDEN III
LEE E. BAINS, JR.
TONY G. MILLER
KAY K. RIDDLE
DEBORAH J. LONG
FRANK D. McPHILLIPS
HAIBETH J. PORTER
MARGARET C. SLOAN
WILLIAM S. DODSON, JR.
SUSAN H. SNYDER
WALKER PERCY BADHAM III
HEYWARD C. HOSCH III
RICHARD C. SMYLY
LAURA A. WOODRUFF

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL

1900 FIRST NATIONAL-SOUTHERN NATURAL BUILDING
BIRMINGHAM, ALABAMA 35203
(205) 252-8800

E. H. CABANISS, 1857-1936
FORNEY JOHNSTON, 1879-1965

LUCIEN D. GARDNER, JR.
JOSEPH F. JOHNSTON
M. CAMPER O'NEAL
OF COUNSEL

MOBILE OFFICE
2210 FIRST NATIONAL BANK BUILDING
MOBILE, ALABAMA 36602
(205) 433-6981

June 16, 1983

Office of the Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Evelyn Falkowski, Petitioner v. Bertram N. Perry et al, Respondents

Dear Sir or Madam:

OPPOSITION OR WAIVER THEREOF FROM COUNSEL IN ONE OF RESPONDENT BERTRAM PERRY'S CASES

We received, on June 10, 1983, the Petitioner's petition for certiorari and supporting brief.

I am counsel for Bertram Perry in Case No. 81-7278 in the United States Court of Appeals for the Eleventh Circuit, styled Bertram Perry v. Alvin Golub et al. The single issue in such case concerned attorneys' fees for us as attorneys for Plaintiff-Appellee Bertram Perry in such case. Since there is nothing in the petition for certiorari or supporting brief addressing our entitlement to attorneys' fees in such case, it would seem unnecessary for us to file any brief in opposition to the petition.

Therefore, it is our intention not to file a brief unless we receive instructions otherwise from the Court.

Yours very truly,

William F. Gardner

WFG/bcw

cc: Mr. Bertram N. Perry
228 10th Avenue S.W.
Birmingham, Alabama 35211

Ms. Judy Trent Ellis
Equal Employment Opportunity Commission
2401 E Street N.W.
Washington, D.C. 20506

Ms. Evelyn Falkowski
2501 North Kenilworth Street
Arlington, Virginia 22207

REPLY

In *Glitsch, Inc. v. Bennie D. Jones*, No. 80-1741, 49 U.S.L.W. 3905 (US SCt 1981), this Court summarily vacated judgments below, rejecting an Opposition to a petition for *certiorari* which failed to refute that judgments below were in conflict with its precedents.

Opposition to petition for *certiorari* in this case should be discounted for the following reasons:

A. The Opposition Omits Significant Facts:

The only published history of the three cases appealed will be history for as long as there is written record. That official history is belied by evidence in this record and by the actual unpublished law of the case. Respondents do not discuss the misrepresentation against EEOC, including Petitioner, of the published record. Such false history (and its causes) can be corrected by this Court.

The account of facts in the Opposition omits significant facts brought out in the Petition (p. 24) which are undisputed, for example, the excerpt from EEOC's brief to the Eleventh Circuit:

> "Supervisors in the office and the district counsel all heard Mr. Perry use offensive language on numerous occasions ... often referring to Ms. Falkowski as "that bitch," "that thing in there" and "ugly white bitch." ... Mr. Perry also treated other employees in an offensive manner, shouting at them ... and accusing them of racism ... and sexual misconduct ...."

The Opposition does not say why Petitioner was expected not to conflict with such actions of a subordinate. The Opposition (p. 2) characterizes these cases as the result of "intra-office disputes." The Opposition does not discuss why evidence of Mr. Perry's insubordination and deceptions as to Petitioner's conduct resulted in a decision of mootness, rather than a decision on the merits of *Perry v. Golub* favorable to EEOC defendants, including Petitioner.

The Opposition states on p. 3 that *Perry v. Golub*, 400 Fed. Supp. 409 (1975) is vacated by the Fifth Circuit, but ignores that the Court which signed it essentially reiterated its findings in a published fee decision *after* it was "Vacated."

The only published Fifth Circuit action in *Perry v. Golub* is, *in toto*, "Affirmed and Vacated." Yet the oft-cited district court decision publishes her supervisor's stigmatizing queries (based on reports from Perry), which were sent to Petitioner after her authority was withdrawn by EEOC. Nowhere is it published that the queries were answered by Petitioner, that charges against here were not sustained, and that her authority was restored.

Nowhere is it published that Petitioner "prevailed" in her suit [*Falkowski v. (Lowell) Perry* (Pet. 82a)] to regain her authority. (Although actions taken in the face of litigation are often equivocal, the district court mooted her Title VII rights without a hearing, over the objection of Petitioner, and with the approval of EEOC).

Petitioner and Perry had opposed summary transfers by EEOC before different judges on the same day in 1975. Petitioner, named officially with two men EEOC defended in a suit by Perry, had vainly contacted her employer to assure her legal defense. The decisions for Perry state that she elected not to testify, but the same Court stated that she tried to testify (Pet. 27-28). That Court implied that her private counsel thought that Petitioner had something to hide and kept her off the stand.

Petitioner, however, had nothing to hide. In fact, well in advance of the hearing at which Petitioner is claimed to have "elected" not to testify, Petitioner had refuted to EEOC Bertram Perry's allegations concerning her conduct, and had requested legal assistance from EEOC, which ignored her requests. The decision resulting from the hearing, published at 400 F. Supp. 409 (1975) and subsequent *Perry v. Golub*

decisions which refer to the first, erroneously perpetuate the impression that Petitioner did not oppose Perry's allegations.[1]

B. *The Opposition Mis-States the Issues:*

Respondents mischaracterize the case as an attempt to overturn fee award decisions. But the real issues involve substantial federal questions.

The real issues include lack of due process, false stigma, false signals, cover-up of exculpatory evidence, and unmet professional responsibilities of Federal officials and Officers of the Court, *not* fees.

None of the responses, including those in two "waivers of response," deny Petitioner's evidence of unresolved conflicts of interest of counsel, contradictory positions taken by government Counsel before different Courts, the use by government counsel against her of decisions adverse to Petitioner *after* they were vacated, and the cover-up of evidence of deception, fraud, and insupportable abuse by a Federal subordinate employee (Bertram Perry) toward a Federal supervisor (Petitioner). This deception and abuse is reinforced by the only published history of these cases to date.

The Opposition ignores that published history since 1975 fails to reflect any of the evidence adverse to Bertram Perry's claims or the actual legal disposition of two of the cases appealed.

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[1]It now appears that Petitioner's initial private counsel, after agreeing to represent her at both Mr. Perry's hearing and hers may have decided to avoid disputing the merits of Perry's attack on her at that time, because at the "eleventh hour" of preparation, they discovered a potential conflict of interest on their part. Not only were they representing Petitoner in *Perry v. Golub*, but they were also representing parties in one or more Title VII cases which Perry was claiming were improperly slanted by Petitioner. [See e.g., *Morgado v. Jefferson County*, CA-11, 32 EPD ¶33,675 (1983.] Note that these attorneys also represent the *Birmingham News*, which in 1978 headlined the district court's attack against EEOC and Petitioner. (Excerpts 1a and 2a *infra*).

Respondents do not recognize that the district court awards to Petitioner and to Perry defy two controlling appellate decisions (Pet. 133a and Response 1a) which must be read in *para materia.*

The Opposition fails to mention that the decision awarding fees to Bertram Perry (*Perry v. Golub*, 25 EPD ¶ 31,488 (1981) reflects a pattern of irregular judicial action by the same judge for the Northern District of Alabama. (Some manifestations of the pattern, with support by EEOC, have been corrected or exposed on appeal).[2]

The award to Perry was issued after the Court requested Bertram Perry's counsel to draft a proposed decision. Whether the Court "rubber-stamped" such a decision cannot be determined by the parties; none received a copy of the proposed decision.

As an article on false pleading in the journal of the American Judicature Society notes, "When zealous advocacy is unconcerned with the certainty of enforcement of judicial sanctions, then abuse of process is inevitable." *E.g.* R. L. Curry, *Query: Should Judges Impose Sanctions for False Pleadings?*, Vol. 67, Judicature (No. 2, August 1983).

The earlier decision by the same Court, *Perry v. Golub*, 464 Fed. Supp 1016 (1978) treated as established, the Court's 1975 preliminary injunction decision maligning Petitioner, though that Court in 1976 dismissed the case as moot without a trial. The Birmingham News (Reply 1a, 2a *infra*) quoted the privileged defamation.

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[2]See *Little v. Southern Electric Power Co.*, 595 F 2d 998 (CA5 1979) wherein that Court was found to have impugned a Black man without record support; *James v. Stockham Valves*, 559 F. 2d 310 (CA5 1977), notes 1, 3, and 10, wherein that Court was found to have rubber-stamped defendant's proposed findings; and *White v. U.S. Pipe & Foundry Co.*, 646 F 2d 203 (CA5 1981)—all among cases where EEOC intervened to assist those deprived by the Court.

C. *The Opposition Does Not Refute the Petition:*

Petitioner's opponents successfully stressed to this Court in No. 79-1244 that the District Court decisions in that case not only did not find Petitioner to be a wrongdoer, but that the decisions were subsequently vacated. Petitioner again points out that the same counsel later quoted the same "vacated" findings in order to oppose her in susequent proceedings. "Vacated" findings have deprived her of legal support by the government in two suits by Bertram Perry against her as an EEOC district director. The opposition has nowhere refuted any contentions by Petitioner.

D. *The Eleventh Circuit Affirmances Were Error:*

Petitioner's due process arguments regarding misleading published "history," a history at odds with Fifth Circuit rulings on the cases, were valid:

> "The due process clause of the 5th Amendment of the United States Constitution restrains alike every branch of the Federal government, whether of an executive, legislative, or judicial character ... It prevents the judiciary from condemning one in his person or property without ... opportunity to be heard before judgment." *Wilson v New*, 243 US 332, 336 (1916).

> Her due process arguments regarding conflicts of interest of counsel were also valid. This Court recognized that *Wood v. Georgia*, 370 U.S. 375 (1961) had national implications.

> Petitioner asked below and now here for a holding to show that the district court improperly reiterated the 1975 and 1978 findings in a published fee award *after* the Fifth Circuit vacated them in 1979.

> As counsel for Petitioner pointed out, had the district court possessed jurisdiction to attack Petitioner's reputation, the Circuit Court would have had a duty to review findings asserted to be unsupported. Where, as here, the district court lacked jurisdiction to make such an attack, there may be a greater duty. The Eleventh Circuit accepted

motion containing this supplemental argument (Reply 3a-8a *infra*). Yet its published action on the latest *Perry v. Golub* "whistle blower" decision [25 EPD ¶ 31,488 (N.D. Ala 1981)] and the entire consolidated appeal consists of the words, *Perry v. Golub*, "Affirmed in Part," 691 F. 2d 510 (CA 11 1982).

SUMMARY ACTION BY THIS COURT

The *Hruska Commission Report*, reprinted in 67 F.R.D. 195 (1975) finds the Supreme Court's burden a difficult one. Nevertheless, Petitioner asserts that three aspects of this case merit at least summary consideration by this Court:

(1) Preliminary injunction findings which stigmatize Petitioner have improperly become the published implied law of the case. This result is inconsistent with *University of Texas v. Camenisch*, 101 S. Ct. 1830 (1981), which holds that findings with a preliminary hearing not noticed as a final hearing, as here, may not be final findings.

Fee awards should not imply that there was a trial on the merits when there was not, as they do in these cases. Instead, fee decisions should reflect the prevailing party status of each party under the Fifth Circuit Opinions, in accordance with *Hensley v. Eckerhart*, U.S., 32 EPD ¶ 33,618 (1983), unless the cases are re-opened for review of fraud upon the Courts.

(2) Falsely stigmatizing published decisions were vacated by unpublished appellate decisions with notations which do not show what was affirmed and what was vacated. The lack of clarity following appeal as to the status of the stigmatizing decisions effectively continues the stigma. The Eleventh Circuit's notation of "Affirmed in Part" in *Perry v. Golub* does not set the record straight as to what the Fifth Circuit previously upheld, which was mootness based on informal resolutions. Neither does the notation convey what the Eleventh Circuit upheld.

An August 1983 LEXIS printout of decisions by Judge Guin does not reflect the fact that the *Perry v. Golub*, 400 Fed. Supp. 409 (N.D. Ala. 1975) Opinion was vacated, nor does Shepard's *Citations*. That 1975 Opinion continues to be cited as precedent because Fifth Circuit action is noted at 594 F. 2d 861, "AFFIRMED AND VACATED." This conveys not the actual Fifth Circuit decision (Pet. App. 133a) but the MISUNDERSTANDING that findings adverse to Petitioner were AFFIRMED, and that injunctive relief to Perry was VACATED as moot. Subsequent fee Opinions here appealed compound the misunderstanding. Petitioner sought clarification from the Eleventh Circuit, but the unpublished Eleventh Circuit Opinion, if published, would not correct district court violations of due process renewed in decisions awarding fees (Petition pp 44-45, 48).

Petitioner does not argue that all appellate court decisions need to be published. Petitioner does ask this Court to consider the extent to which due process requires lower appellate courts to publish action on published district court opinions sufficient to convey what is upheld and what is not.

According to generally agreed-upon criteria, a published Opinion must be filed where, as here, a decision *denies enforcement of an Order* and the lower court has published an Opinion supporting the Order. (See e.g. R.L. Stern, *Appellate Practice in the United States* (1981) at 487. Stern, *supra* refers to recent studies of appellate court administration as well as the rules of several courts. Non-published appellate action in these cases does not meet generally agreed-upon criteria for unpublished appellate decisions.

(3) Petitioner's third question presented for review is whether representations made to Courts regarding this case constitute fraud on the Court. This raises issues of professional conduct of Federal Officials and Officers of the Court which have not been countered by responses or waivers by parties or counsel in this case.

Most startling is the treatment of Petitioner, an isolated (Pet. p. 9) woman, doing a job especially unpopular in Alabama, by an Alabama District Court. Without showing the

nature (8a, 9a *infra.*) and relevance (Pet. 144a) of intemperate conduct by her subordinate which that Court stated in a 1978 Opinion would "curl a sailor's hair," the Court inexplicably found that EEOC's failure to process Petitioner's grievances was "only human." Without testimonial or even hearsay support, the Court likened her behavior to that of a raving maniac, and declared her insubordinate subordinate to be a hero.

When all that was summarily vacated, not as unsupported, but merely as beyond the jurisdiction of the Court, that same district court issued decisions on fees referring to and incorporating the substance of all his vacated findings.

CONCLUSION

A departure from the usual course of judicial proceedings such as to violate the integrity of the judicial process and warrant this Court's supervision under the final clause of its Rule 17.1 (a) (1980) is manifest from undisputed facts in this case.

A summary reversal without Opinion, if the case were settled, might not correct false signals and false stigma. Petitioner respectfully requests that this Court note sufficient background and undisputed facts to correct the record. While Petitioner does not see any correction that could make her whole, she suggests the following to help set the record straight:

> As this Court has previously noted, in *University of Texas v. Camenisch, supra,* findings regarding a preliminary injunction when there has been no notice of a final hearing may not constitute final findings on the merits of any issues, and to hold such findings as established, as was done in this case, violates due process.
>
> All prior findings below, other than that the cases are moot, have been vacated. Bertram Perry withdrew two lawsuits against Evelyn Falkowski, and EEOC withdrew all charges against her, as having arisen out of misunderstanding. Bertram Perry and Evelyn Falkowski continued their employment with EEOC in good standing when these actions were resolved.

Since vacated decisions imply that Petitioner was guilty of wrongdoing, it is fair to say that EEOC accepted her explanations and documents when the agency withdrew all charges proposed against her.

The judgment of the Eleventh Circuit, to the extent it affirms decisions on fee awards, conflicts with controlling unpublished decisions of the Fifth Circuit which must be read in *para materia.* The effect of these Fifth Circuit decisions is to vacate, to spawn no consequences, all findings on the merits of these cases, and to hold that Evelyn Falkowski and Bertram Perry prevailed to the same degree when their suits to prevent their summary transfers by EEOC became moot, since EEOC withdrew a plan in 1975 to reassign them.

The judgment below is reversed with instructions to remand all the cases for a common decision regarding fee entitlement, by the tribunal who heard the last filed of the three cased consolidated on appeal, *Perry v. Falkowski* (Pet. 142a-145a), or otherwise to assure prompt action consistent with prevailing status of the parties on the entire case consolidated on appeal, (and any other determinations of this Court) by an impartial tribunal.

May this honorable Court, with summary action or with full deliberation, ameliorate the undisputed problems reflected by this petition.

Respectfully submitted,

Evelyn Falkowski, *Pro se*
2501 N. Kenilworth St.
Arlington, Virginia 22207
(703) 534-4270

OF COUNSEL:
Edward Owen Falkowski, Esq., P.O. Box 18
Fayetteville, Tennessee, 37334

Owen E. Perry, Esq., 3000 Town Center, Suite 2121
Southfield, Michigan, 48075

Kathleen Hamor, Esq., 5 Oxford Street
Chevy Chase, Maryland, 20815

APPENDIX

Excerpt -Birmingham News
Birmingham, Alabama 11/22/78 1a

'whistle blower,

BY ANDREW KILPATRICK News staff writer

A government agency charged with assuring fair hiring and promotion practices retaliated against a Birmingham office employee, a U.S. District judge has ruled.

The U.S. Equal Employment Opportunity Commission (EEOC) retaliated against Bertram Perry for "whistle blowing," according to an order entered Tuesday by Birmingham's U.S. District Judge J. Foy Guin Jr.

GUIN

The order, which makes a sweeping commentary about the EEOC, concludes a lengthy court case involving EEOC and makes numerous findings about the agency.

● Guin's order said EEOC may seek disciplinary action and try to transfer the director of the Birmingham office, Mrs. Evelyn Falkowski.

● The order characterizes some of her behavior as "the fit of a raving maniac," and says that Mrs. Falkowski and Perry carried out a four-year feud which included cursing, slander and throwing "wads of paper at one another."

● Guin's order says EEOC's "disparate treatment" of Perry is peculiar in light of treatment officials received for the "gross incompetence and neglect of duty" at EEOC's Memphis office and the "destruction of records" Guin said has occurred at EEOC's Chicago office.

● Guin's order calls into question the reliability of the testimony about a racial slur attributed to a top-ranking official of EEOC, Alvin Golub, the agency's executive deputy director.

● Additionally the order says that an EEOC witness, Atlanta's regional director, Robert Jeffrey Sr., "grossly misstated his educational qualifications."

Excerpt, Birmingham News Editorial
Birmingham, Alabama 11/18/78

Whistle Blower Wins

What might have passed unnoticed as a minor personnel flap inside the Birmingham office of the U.S. Equal Employment Opportunity Commission has thankfully produced a federal judge's stinging rebuke of the agency's devious methods to silence a "whistle blower," a government employee who points out abuse, error or inefficiency.

Federal District Judge J. Foy Guin's order in the case is highly readable and makes telling points concerning how a local miniscandal grew to envelop the Washington headquarters of an agency which has for years deflected serious questions about its integrity.

But the import of the voluminous court records would have drawn little public attention were it not for the efforts of *Birmingham News* reporter Andrew Kilpatrick, and the editorial comments here, concerning a case about which the public has every right to know. If this newspaper had relied on the soothing denials and assurances of EEOC officials in Atlanta or Washington, it is certain a much different picture would have emerged.

The background is basically this: Mrs. Evelyn Falkowski, director of the Birmingham EEOC unit, and Bertram Perry, her chief deputy, have been at odds for the four years she has been here. They have argued, cursed and filed internal complaints against each other. Their higher-ups took notice not just because of all the racket, but because Perry harped that EEOC was riddled with mismanagement. As a result, Guin states that the agency made strenuous, and improper, efforts to silence him.

OWEN E. PERRY
PAUL J. REISING
DAVID R. SYROWIK

STANLEY C. THORPE

July 7, 1982

Clerk of the Court
United States Court of Appeals
For The Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

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Re: 81-7278 Perry v. Golub, et al
Falkowski v. Perry (Consolidated with
81-7643, Perry v. Falkowski)

Dear Clerk:

Oral argument took place in this case on June 30.

During rebuttal argument on behalf of Ms. Falkowski, a dialogue took place between the court and counsel for Ms. Falkowski regarding Ms. Falkowski's request for some form of relief from this court to mitigate the damages inflicted upon Ms. Falkowski by the published decisions of Judge Guin,

and in particular, by the intemperate wholly gratuitous reference to her as a "raving maniac" and a "wild screaming woman" contained in those decisions. A question from the panel -- largely rhetorical in form -- suggested that this court is without power to do anything. This apparently had reference to prior suggestions that this court lacks jurisdiction; the thrust of the rhetorical question was that if the district court lacked jurisdiction, this court would have no power to consider Ms. Falkowski's request.

The following is submitted as a further response to that question by the panel.

Implicit in the question from the panel is the suggestion that this court could possibly consider Ms. Falkowski's request if Judge Guin had had jurisdiction -- but could not if he did not have jurisdiction. This is a paradox. Assuming, arguendo, that Judge Guin lacked jurisdiction -- even more so is it appropriate for this court to take every step available to it to restore the status quo ante and mitigate the irreparable harm inflicted upon Ms. Falkowski. If there were